NO. 54110-6-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

---

STATE OF WASHINGTON,

Respondent,

v.

Nga Ngoeung,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

---

# OPENING BRIEF

---

KATE L. BENWARD
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

## Washington State Supreme Court Decisions



## Washington Court of Appeals Decisions



## Statutes



## Washington Constitutional Provisions



## Federal Constitutional Provisions

## United States Supreme Court Decisions



## United States Court of Appeals Decisions



## Other Authorities

## A. INTRODUCTION

Nga Ngoeung was born in a refugee camp after his parents fled Cambodia's genocide. His family later settled in the United States, where they lived in extreme poverty, surrounded by gang violence. Nga was developmentally delayed and left school after the fourth grade.

Nga was forced into gang life. When he was 17, he drove a car from which a 15-year-year old gang member shot at four teens, killing two and wounding two others. He was convicted as an accomplice of two counts of aggravated murder and two counts of assault and sentenced to life without parole.

Years later, in 2015, Nga was resentenced after *Miller*, which allowed life without parole sentences for only the rare juvenile "whose crime reflects irreparable corruption."[1] Despite ample evidence Nga functioned lower than his adolescent peers at the time and that he shot no one, the sentencing judge called Nga's conduct "sociopathic," blamed his family, and again sentenced him to die in prison.

---

[1] *Miller v. Alabama,* 567 U.S. 460, 479-80, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

After the state Supreme Court declared life without parole for juveniles unconstitutional, the same sentencing judge who condemned Nga to die in prison refused his request for recusal at his third resentencing in 2019. This time the judge entered findings regarding Nga's significant cognitive limitations then and now. Despite finding Nga's youth and cognitive limitations diminished his culpability, requiring concurrent, minimum terms for his aggravated murder convictions, the court inexplicably granted the prosecutor's request to impose consecutive, standard range sentences for his assault convictions, resulting in a minimum term sentence of 41 years.

The judge failed to meaningfully consider the *Miller* factors, explain its reasoning, or account for the mitigating fact of Nga's cognitive deficits in respect to each of the *Miller* factors. The sentencing court also impermissibly placed the burden on Nga to prove his diminished culpability warranted a lesser sentence. These failings require reversal and remand for resentencing before a different judge.

B. ASSIGNMENTS OF ERROR

1. The sentencing judge erroneously denied Nga's motion to recuse.

2. The sentencing court failed to meaningfully consider each of the *Miller* factors and consider mitigating evidence.

3. The sentencing court failed to thoroughly explain its reasoning for imposing standard range, consecutive sentences for the assault convictions despite finding Nga's youth and personal attributes compelled the lowest sentence available for his aggravated murder convictions.

4. The sentencing court failed to consider Nga's cognitive disability in respect to each of the *Miller* factors.

5. The trial court required Nga prove his youth was a mitigating factor supporting an exceptional sentence.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial judge err in refusing to recuse himself from resentencing Nga after reversal of the court's unconstitutional sentence of life without parole when the judge's previous statements about Nga, the crime, and his life

circumstances would make a reasonably prudent, disinterested observer conclude the hearing was not fair and impartial?

2. The sentencing court was required to meaningfully consider the *Miller* factors in light of the facts of Nga's case, providing factual support to substantiate its findings, and to reconcile mitigating evidence. The court was also required to thoroughly explain its reasoning. Is Nga entitled to reversal and remand for a new sentencing hearing where the court failed to consider all of the *Miller* factors, made findings unsupported by the evidence, and failed to explain its reasoning for imposing a standard range, consecutive sentence for his assault convictions despite finding Nga's youth and personal attributes warranted a minimum sentence for his aggravated murder convictions under RCW 10.95.030?

3. *Miller's* factors rest on the transitory, diminished culpability of youth. However, these same factors may endure into adulthood when the person suffers an intellectual disability. Must the sentencing court explicitly account for intellectual disability when assessing a child's capacity for change and history of rehabilitation in an institutional setting? Did the trial

court fail to account for this mitigating aspect, instead making only generalized findings about rehabilitation and inaptly comparing Nga to other defendants without his limitations?

4. Because children are categorically less culpable than adults, must the sentencing court presume that the child's youth is a mitigating factor supporting an exceptional sentence unless the prosecution proves the child is the rare offender whose culpability is more like an adult's? In Nga's case, did the trial court err in relying on RCW 9.94A.535(1) in imposing an "exceptional sentence" under RCW 10.95.030 and did the prosecutor's complete disregard of the *Miller* factors mean the prosecutor failed to prove this by any standard of proof?

D. STATEMENT OF THE CASE

**1. Timid, quiet and cognitively delayed, Nga is different from his peers; but like many of them, he is forced into gang life at a young age.**

Nga's family was forced to flee the Khmer Rouge's genocide in 1975. CP 126. They left with nothing in the face of certain death, finding refuge in Thailand with their young son, Ngoun. RP 14; CP 126.

The conditions in the refugee camp were dire: there was not enough food, no doctors or medical care, people were cramped together in small spaces, and they had to sleep on the ground. CP 126. They stayed about five years in the camp. CP 126. Nga was born into these conditions. CP 127.

Nga's mother was malnourished and received minimal prenatal care, which likely diminished Nga's "innate biological capacity prior to birth." CP 251. There was no medical care for him after he was born, and he suffered seizures as an infant. CP 126-27. When he was 8-9 months old, he suffered a seizure so severe his parents thought he died. CP 127. His parents took him to a "medicine man" and Nga miraculously awoke. CP 127.

Nga's parents attributed his subsequent developmental delays to this seizure. CP 128. Nga lagged far behind his siblings in major milestones, including not talking until he was around two years old, and even then, communicating through incomprehensible words and grunts. CP 128. He played mostly by himself rather than with his siblings, did not speak much, and often did not understand when people spoke to him. CP 128.

His family relocated to Seattle in 1980, when Nga was about four years old. CP 128. They ultimately settled in the low-income housing projects in Salishan, Tacoma. RP 15; CP 129.

Salishan was a notoriously dangerous neighborhood riven by gang violence. CP 130; RP 15. There were regular drive-by shootings. RP 15. Nga's house was hit a couple of times. RP 15.

The violence and deprivation experienced by Cambodian refugees like Nga's parents caused high rates of post-traumatic stress disorder, and depression for many. CP 126. When Nga's family came to the United States, they had no money, spoke no English, and knew nothing about American culture. CP 129, 151. Nga's family was unable to maintain a close connection during Nga's childhood. CP 133. His dad was an alcoholic and was violent towards his mother. CP 151. He also used harsh, abusive discipline against Nga and his siblings. CP 151.

Nga's brother Ngoun remembered Nga as a quiet, "good kid." RP 16. He was soft hearted, cried easily, loved animals and nature, never got into fights, and was not violent. RP 16.

When Nga reached school age it was clear he had difficulty learning and did not "catc[h] on quickly." RP 16. Nga

did not start school until the first grade, when he was almost seven years old. CP 132; 150. On the first day of school Nga cried and had to stay with older brother Ngoun. RP 16.

Nga struggled to learn English and was frequently absent from school. CP 132. Ngoun learned English more quickly than Nga—he had less of an accent and was more easily understood. CP 132. Due to language and cultural barriers, his parents could not help Nga with school. CP 132-33, 151.

Nga was in first grade for three years in a row. CP 132. By fourth grade, Nga was older than his peers. CP 133. Testing revealed that he still read at a first or second grade level. CP 133. He was teased for being so much older than the kids in his grade. CP 133. Nga and his brother were also a target of teasing at school because they could not afford new clothes. CP 133.

Nga's school records indicate no aggressive behaviors. CP 151. However, he was expelled for truancy shortly after he began fifth grade. CP 133.

Where Nga grew up, school children ended up joining gangs either on their own or by force, as both a means of protection and a lack of choice. RP 17, 34, 36, 134. When Nga was 16 years old, his cousins invited him to play basketball, but instead a group of young men "jumped" him—punching, kicking and beating him as a form of initiation into their gang. RP 17; CP 139. Ngoun also belonged to a gang, and did not even know Nga had been jumped into one. RP 17. Unlike Ngoun, who was a gang leader, RP 135, Nga was a follower. CP 119. Nga was gullible and easily convinced to do things by his peers. CP 135.

One night in 1995, when Nga was 17 years old, he was hanging out at a known gang house when four teenagers drove by and egged the house. CP 57. Believing this was a gang attack, 15-year-old fellow gang member Oloth Insyxiengmay took a rifle from the house. CP 57. Oloth and two other boys got into a car with Nga driving and they pursued the car. CP 57. Oloth aimed the rifle out the window and shot at the other boys' car. CP 57-58. Two of the boys were killed. CP 58; CP 493 FF 1.

When they returned to the house, Oloth gave the rifle to another person with instructions to dispose of it, stating they

shot up the "rickets," a term used for opposing gang members. CP 58; RP 75. Nga was arrested soon after and confessed to police that he drove the car during the shooting. CP 58.

### 2. Nga is twice sentenced to life without parole for driving a car during a shooting when he was 17 years old.

Despite Nga being older than the other two boys in the car, Nga took direction from them. CP 119. In fact, Oloth always thought Nga was younger—not until they were charged for this offense did he learn that Nga was actually several years older. CP 119.

Nga was tried as an adult in 1995, and convicted as Oloth's accomplice for two counts of aggravated murder, two counts of first degree assault and taking a motor vehicle without permission. CP 56. Nga received two mandatory life without parole sentences for the aggravated murder convictions, and an additional 267 months for the additional convictions. CP 56.

Oloth, the shooter, was convicted of two counts of the lesser charge of murder in the first degree based upon the element of extreme indifference to human life, and two counts of first degree assault. CP 405-06, 412-13. He was sentenced to 886

months in prison. CP 119. Unlike Nga, Oloth's convictions made him parole eligible, and he was released by the Indeterminate Sentence Review Board (ISRB) after serving 271 months. CP 119; CP 493 FF 4. The other boy in the car agreed to testify against Nga and Oloth in exchange for remaining in juvenile court and a sentence of about eight years, or until his 21st birthday. CP 120; CP 493 FF 5.

In 2012, the Supreme Court declared mandatory life sentences for juveniles unconstitutional. CP 58. The legislature amended the aggravated murder statute —Ch. 10.95 RCW—to no longer mandate life without parole. CP 58.

In 2015 Nga had a new sentencing hearing in front of a different judge. CP 59, 71. The mitigation evidence in this case included the three evaluations from the 1990s with different diagnoses, ranging from mildly mentally retarded, emotionally disabled, to extremely uneducated. CP 60.

An updated 2014 mental health report confirmed that at the time of Nga's offense, his cognitive and psychosocial functioning was different from an adult's and delayed even relative to other 17-year-olds. CP 60.

Despite reviewing the evidence of Nga's limited capacity, the sentencing judge called Nga "morally bankrupt and sociopathic." CP 78. And though it was undisputed that Nga drove the car and shot no one, the court condemned "his brutal and murderous rampage." CP 78. The sentencing court stated it reviewed all of the mitigation evidence. CP 62. The court again imposed two consecutive life without parole sentences for the aggravated first degree murder convictions and ordered the sentences on the remaining counts consecutive to the life without parole sentences. CP 62; CP 494 FF 6.

### 3. Nga's youth, cognitive limitations, and status as a racial minority make prison life particularly perilous.

Due to his convictions and original life without parole sentence, Nga was classified as "close custody" and housed at the penitentiary in Walla Walla, a maximum security facility then notorious for high rates of violence. RP 39-40; CP 253.

According to Dr. Michael Stanfill, a psychologist and former psychiatric services clinical director for the King County Jail System, RP 31, Nga had to contend with older, more aggressive and more physically mature adults. RP 39. When

Nga was first housed at Walla Walla it was known that unless the inmate was willing to participate in violence, he would become a victim. CP 253.

Nga's "young age, relative immaturity and poor cognition" placed him at a high risk for being victimized. CP 255. Due to these risks, he needed the support of and protection from older inmates in positions of authority to avoid being abused. CP 255.

Besides being young, Nga was also a target for violence because of his race: ethnic Asian gangs made up a relatively small number of inmates in Washington prisons and were targeted by other majority groups. CP 253.

Prison gangs provide the same kind of protection in prison as they did in Nga's neighborhood. RP 39. Nga sought this known source of protection where he had been condemned to spend the rest of his life. RP 39; CP 253-55.

The violence of Nga's surroundings was the "social and environmental influences" that defined the availability of decisions available to him in prison. RP 40. Receiving protection from this group affiliation requires adherence to a strict code: if someone is protecting you, this means you must be willing to

protect them, which includes fighting for them. CP 254. Over the nearly 25 years that Nga spent in prison, he accrued a number of infractions that reflect the dictates of the gang code that protected him. RP 8-9; CP 253-56.

During Nga's first few years in prison, it appeared he was able to get by with only a few minor infractions. CP 253. However, since 2001 he was involved in five separate incidents that resulted in sanctions to a minimum of nine months in administrative segregation for each incident. CP 253. Two of these were related to riots, others to smaller scale physical altercations with members from different ethnic gangs. CP 253. During one of these altercations, he struck an intervening guard and subsequently pled guilty to custodial assault. CP 253.

Due to his youth and cognitive limitations when he entered prison, it is likely that "more antisocial and sophisticated men" offered Nga protection and support while using him for their own ends. CP 255. Nga was never a gang leader and defers to younger members, which is unusual given his age and length of gang involvement. RP 44; CP 254.

Nga's conduct in prison was not the result of sociopathy, but instead "a direct response" to "living in a very dangerous setting" where "strong values associated with violence and abiding by a 'code' [were] required to maintain one's sense of safety," regardless of the consequences. CP 256. Nga's history of institutional violence was based on "reciprocity and mutual protection" that was "situation and location specific," not any sociopathic tendencies or propensity for violence. CP 255-56; RP 43. Dr. Stanfill reached this conclusion based on Nga's low "psychopathy checklist score." CP 254-55; RP 42-43. The two biggest factors in Nga's prison infraction history are his arrested development and the high rate of violence in the prison that he had to negotiate. RP 43-44; CP 255-56.

**4. At Nga's third sentencing, the court finds Nga's youth and personal attributes require an exceptional sentence, but still imposes a standard range, consecutive sentence for the assault convictions.**

In 2018, after Nga had served nearly 25 years, the Washington Supreme Court declared that life without parole for juvenile offenders violated the State Constitution, and Nga's

sentence was reversed and remanded for a third sentencing hearing. CP 63-64.

Nga asked the judge from his 2015 resentencing to recuse himself based on his prior statements that Nga's behavior was "sociopathic," sentencing him to die in prison notwithstanding evidence of possible mild mental retardation, extreme lack of education, fear of gang members at the time of the offense, an abusive family and violent neighborhood, and current mental health issues such as PTSD and depression. CP 60, 65-66, 70-79. The sentencing judge denied Nga's motion to recuse. CP 84.

Nga presented updated mitigation evidence that specifically addressed his diminished culpability under each of the *Miller* factors, including life circumstances beyond his control: suffering in refugee camps, malnourishment, trauma, low cognition, immaturity, his need to conform, and "a crime-filled environment of American gangs that his culture had to adapt to." RP 71, 81-82; CP 85-322. Nga argued these hardships created the circumstances of the tragic shooting, but were not a choice: "[w]e blame him for this because he chose to drive a car

on this day. But his ability to choose was so weakened by those factors, his choice was almost nonexistent." RP 81-82.

Dr. Stanfill conducted an updated forensic psychological evaluation of Nga as a 41-year-old man. RP 36; CP 249-63. This report supported previous evaluations that Nga had borderline intellectual functioning and limited decision-making ability then and now, due to the violence in his home and neighborhood growing up and later in prison. RP 32-44; CP 259-63.

Nga's family members testified about their current stable lives and love for Nga. RP 13-29. His older brother, Ngoun, left gang life in his late twenties and has a stable job and family. RP 18, 20. If not deported to Cambodia upon his release, Nga has a home with Ngoun's family who could offer him the emotional and financial support Nga needs but has never had. RP 18.

Nga expressed his heartfelt apology to the victims and his deep understanding of the harm he had done. RP 83-86. Nga asked the court to impose a sentence of concurrent terms for each offense, for a total sentence of 25 years, reminding the court the actual shooter had already been released: "Nga's role

in the deaths and the shooting is smaller than those who already have received 25 and 26 years to life." RP 77, 82.

In response, the prosecutor questioned Dr. Stanfill about the ISRB's criteria for release, which Dr. Stanfill clarified was different from the *Miller* factors. RP 45-47. The prosecutor only obliquely referred to the *Miller* factors, referencing Nga's "stage of development—which I won't repeat. I know the Defense will dwell on that, and you should take that into account, absolutely." RP 66. Rather than address this central inquiry, the prosecutor urged the court to "take into account the experience of these victims' families and the two boys who were shot and, as I say, arrive at a sentence in which each of these crimes is punished for what it was, a very serious violent crime." RP 66.

The victims' parents also testified. One father expressed his "biggest fear of all of this is these animals get out of prison." RP 54. The other victim's father expressed not wanting "animals like that on the street" and asked the judge to keep Nga in prison "where he belongs." RP 57.

The sentencing judge began Nga's sentencing stating that he had "an open field to run on" in determining Nga' sentence. RP 10. The court considered the evidence of Nga's low cognitive functioning and found that "in this case there is considerable evidence of psychological damage, something not behaviorally driven, but indeed part of an organic brain issue, whether that is genetic, related to earlier brain trauma." RP 92; CP 496 FF 18. This was based on evidence of "many instances and examples of seizures, head trauma, developmental delays, and difficulties in school." CP 495 FF 10. The trial court also found that Dr. Stanfill's testimony and report established that these cognitive deficiencies meant Nga was more "immature, less cognitively complex, overly compliant to antisocial peers, and directly impacted by socioeconomic and geographic and other social factors" that were beyond his control. CP 495 FF 11.

The sentencing court found that at the time of the offense, Nga was "likely in a borderline range for mental retardation and certainly well below normal functioning." CP 495 FF 14. Nga's mental disabilities continued in prison, where a 2002 report noted "psychomotor retardation, anxiety, and recurrent major

depression." CP 496 FF 15. Thus, the deficits present at the time of the crime "persisted" into the present and support the earlier findings of low cognitive functioning. CP 496 FF 17; RP 93.

The court's findings also reflected Nga only "sporadically" received treatment in DOC. CP 496 FF 16. However, the court attributed this to Nga's "choice." CP 496 FF 16.

Though the court never cited the *Miller* factors, it did find "substantial and compelling reasons involving the attributes of youth and Mr. Ngoeung's personal attributes in this case to justify an exceptional sentence." CP 497. The sentencing court ran the two aggravated murder convictions concurrent to each another. CP 518. Despite finding Nga's youth and personal attributes merited a 25 year minimum term to life under RCW 10.95.030, the lowest term available, the court ordered standard range, consecutive sentences of 195 months for the assault convictions as urged by the prosecutor, resulting in a minimum sentence of 495 months, or 41.25 years before Nga would even be eligible for release by the ISRB. CP 497; RP 96-97.

E. ARGUMENT

**1. The judge should have recused himself based on his previously expressed disgust and disdain for Nga and his family.**

Criminal defendants have the right to be sentenced by an impartial court under the state and federal constitutions. *State v. Solis-Diaz*, 187 Wn.2d 535, 539, 387 P.3d 703 (2017); *see also* U.S. Const. amends. VI, XIV; Const. art. I, § 22.

Judges must recuse themselves "when the facts suggest they are actually or potentially biased." *Tatham v. Rogers*, 170 Wn. App. 76, 93, 283 P.3d 583 (2012). The judge must not only be impartial, but must also "appear" to be impartial. *Solis-Diaz*, 187 Wn.2d at 540. A proceeding is valid under the appearance of fairness doctrine only if a "reasonably prudent, disinterested observer" would conclude the hearing was fair and impartial. *Id.*

In evaluating the trial court's decision on recusal, the test is whether a reasonable observer who knows and understands the relevant facts would conclude that the parties received an impartial hearing. *Solis-Diaz*, 187 Wn.2d at 540. Where the record shows "the judge's impartiality might reasonably be questioned," *id.*, the appellate court should remand.

When a judge's discretionary decision is reversed and remanded a different judge should hear the case when "the record reflects that [s]he not only has strong opinions on sentencing generally and juvenile sentencing in particular, but also suggests [s]he has already reached a firm conclusion about the propriety of a mitigated sentence... and may not be amenable to considering mitigating evidence with an open mind." *Solis-Diaz*, 187 Wn.2d at 541.

Prior to his resentencing on remand, Nga moved to recuse the judge, who, after considering the *Miller* factors in 2015, again sentenced him to die in prison.[2]

At Nga's 2015 *Miller* resentencing, the sentencing judge "repeatedly referred to Nga as being a sociopath," which, Nga's counsel pointed out, "is actually a diagnosis from the DSM-5."

---

[2] The Court of Appeals decision did not decide whether on remand Nga should be sentenced by a new judge—it offered only dicta in a footnote that "the appearance of fairness doctrine 'probably' does not require a new sentencing judge." CP 64. Regardless, the general rule requires parties to raise recusal issues in the trial court, rather than in the appellate court. *State v. McEnroe*, 181 Wn.2d 375, 390, 333 P.3d 402 (2014).

8/9/19[3] RP 4. Nga argued that where the judge was not qualified to make this diagnosis, "particularly from the bench," a "disinterested, reasonable observer" might conclude the judge's "unqualified and impromptu diagnosis" was driven by personal bias rather than the evidence. 8/9/19 RP 4.

Indeed, Dr. Stanfill specifically evaluated Nga for sociopathy in 2019. CP 254. He found that, during the 1995 trial, no one described Nga as having sociopathic behaviors, attitudes or beliefs despite the violence of offense. CP 254. Nor did any of Nga's subsequent prison records indicate any such terminology. CP 254. Dr. Stanfill formally assessed Nga for psychopathy, and Nga's scores were very low, reflecting his violence at the crime and subsequently in prison, "while serious, were not the result of psychopathic outlook or propensity towards violence." CP 254.

Though Nga shot no one, the court described Nga' conduct as "brutal and a murderous rampage." 8/9/19 RP 5.

[3] Court hearings other than the 9/6/19 sentencing hearing will be indicated by dates.

The sentencing judge also took Nga's mitigating evidence of his family's hardship and inability to provide for him as a basis to castigate them, telling them they were responsible for his criminality. 8/9/19 RP 10. Nga's sister, who was about 20 years old at the resentencing, and two years old at the time of the offense, "started to audibly sob and got up and left the room." 8/9/19 RP 11. In response to this evidence, the judge argued this castigation was based on the evidence, not bias: "isn't that what you just told me that he was left by his family, from an abusive family, and left to raise himself on the streets in the 4th grade?" 8/9/19 RP 10-11. "How does that not implicate family dynamics?" 8/9/19 RP 11.

Defense counsel also argued that after unsuccessfully trying to convince the court that life without parole was not legally correct under existing case law which was later clarified in *Bassett,* the court announced it would impose a "de facto life sentence regardless," before Nga's counsel was even able to put on the mitigation evidence. 8/9/19 RP 12.

Defense counsel reviewed the sentencing transcript and noted an "oblique reference" to the *Miller* factors, but found the

court "spends much time talking about the fact that Your Honor is going to mete out a punishment that will assuage the victim's fears of Mr. Ngoeung ever getting out of prison again." RP 8/9/19 RP 5. In response, the judge cited to the Court of Appeals opinion which stated the record demonstrates the resentencing court properly considered the *Miller* factors. 8/9/19 RP 6. The judge insisted he considered the *Miller* factors, but that Nga did not like the outcome. 8/9/19 RP 8.

At a minimum, applying the *Miller* factors and again sentencing Nga to die in prison means the judge "prejudged" an issue on which he must again exercise discretion on remand. *Solis-Diaz,* 187 Wn.2d at 540. However, the court's personal opinions about the facts, including the reference to "sociopathy" and describing Nga's conduct as "brutal and a murderous rampage" absent, and even contrary to the evidence in the record, would make a reasonable observer question whether the judge was "amenable to considering mitigating evidence with an open mind." *Id.* at 541. Rather than view the domestic violence in his home as a mitigating aspect that limited Nga's culpability

at the time, the judge saw it as an issue of blame and culpability. 8/9/19 RP 10-11.

The trial court denied the defense motion to recuse, stating he would apply the law after *Bassett* and *Gilbert* and the sentence is "obviously going to change." 8/9/19 RP 18. This is not the standard for determining whether a judge should recuse himself on remand. *Solis-Diaz,* 187 Wn.2d at 540.

Where there was ample evidence a reasonable observer would question the judge's impartiality in this purely discretionary sentencing, the judge erred by not recusing himself, and Nga's case should be remanded for resentencing by a different judge. *Solis-Diaz,* at 187 Wn.2d at 541.

**2. The court erred in ordering Nga to serve a lengthy, adult-range sentence despite determining that Nga's borderline intellectual functioning and youth required the lowest sentences possible for the murder convictions.**

Children are "less criminally culpable than adults" under the federal and State constitutions. *State v. Bassett,* 192 Wn.2d 67, 87, 428 P.3d 343 (2018). For purposes of sentencing, they are "constitutionally different from adults." *Miller v. Alabama*, 567 U.S. 460, 471, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

Children are less blameworthy because their decisions and conduct are driven by immaturity and an "underdeveloped sense of responsibility." *Miller*, 567 U.S. at 471. Scientists confirm they have less brain development in areas of judgment. *Id.* Further, children cannot control their environments. *Id.* They are less able to escape from poverty or abuse and have not yet completed a basic education. *Id.* They "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure, and their characters are not as well formed." *Bassett,* 192 Wn.2d at 87 (quoting *Graham v. Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (internal quotation marks omitted)).

The "distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Miller,* 567 U.S. at 472. For these reasons, before a court may sentence a child to a life sentence, the Eighth Amendment requires sentencing courts to consider certain differences between children and adults (the *Miller* factors) before imposing such a harsh penalty. *Id.* at 479-80; *State v. Ramos*, 187 Wn.2d

420, 434, 387 P.3d 650 (2017). Article I, section 14 categorically forbids sentencing juvenile offenders to life imprisonment without the possibility of release. *Bassett*, 192 Wn.2d at 73.

In Washington, when sentencing children for adult crimes, the sentencing court must consider the mitigating differences between children and adults in *all* cases. *State v. Houston-Sconiers,* 188 Wn.2d 1, 21, 391 P.3d 409 (2017). Any provision in the Sentencing Reform Act limiting this discretion, including the mandatory provision of RCW 9.94A.589(1)(b), does not control, because courts have absolute "discretion to consider downward sentences for juvenile offenders regardless of any sentencing provision to the contrary." *State v. Gilbert,* 193 Wn.2d 169, 175, 438 P.3d 133 (2019).

*a. The sentencing court failed to meaningfully consider the Miller factors or thoroughly explain its reasoning for imposing a life-equivalent sentence.*

The purpose of the *Miller*-fix statute "is to correct unconstitutional mandatory life without parole sentences in accordance with *Miller*." *State v. Delbosque*, 195 Wn.2d 106, 127, 456 P.3d 806 (2020). At a *Miller* sentencing hearing, "the court must take into account mitigating factors that account for

the diminished culpability of youth as provided in *Miller*. RCW 10.95.030(3)(b). The sentencing court must consider:

> the mitigating circumstances related to the defendant's youth, including, but not limited to, the juvenile's immaturity, impetuosity, and failure to appreciate risks and consequences—the nature of the juvenile's surrounding environment and family circumstances, the extent of the juvenile's participation in the crime, the way familial and peer pressures may have affected him or her, how youth impacted any legal defense, and any factors suggesting that the juvenile might be successfully rehabilitated.

*Gilbert*, 193 Wn.2d at 176 (citing *Houston-Sconiers,* 188 Wn.2d at 23 (internal citations to *Miller* omitted).

The sentencing judge must consider these specific criteria and impose a new minimum term consistent with them. *Delbosque,* 195 Wn.2d at 128-29. The guiding principle in these cases is that the harshest adult-like sentences are reserved for only a few individuals, *Miller*, 567 U.S. at 479— "the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is *impossible*." *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718, 733, 193 L. Ed. 2d 599 (2016) (Emphasis added). In applying the *Miller* factors, courts "must *meaningfully* consider how juveniles are different from adults,

and how those differences apply to the facts of the case." *Delbosque*, 195 Wn.2d at 121.

The central inquiry turns on the "relevant mitigation evidence bearing on the circumstances of the offense and the culpability of the offender, including both expert and lay testimony as appropriate." *Id.*

The court must "thoroughly explain its reasoning" in determining whether to impose an exceptional sentence. *Gilbert,* 193 Wn.2d at 176; *see also United States v. Briones,* 929 F.3d 1057, 1067 (9th Cir. 2019) (The record must reflect that the court meaningfully engaged in *Miller*'s central inquiry sufficient for appellate review). *Delbosque* requires sentencing courts to provide factual support for their findings of the *Miller* factors, reminding that "*Bassett's* prohibition on juvenile life without parole sets a high standard for concluding that a juvenile is permanently incorrigible." *Delbosque,* 195 Wn.2d at 118.

The sentencing court's analysis must acknowledge and reconcile any evidence contrary to a finding that a child is "irretrievably depraved." *Id.* at 120. Absent this comprehensive analysis, the court's sentence will be reversed. *Id.* at 119-20.

The sentencing court in Nga's case noted before sentencing that, "after reading *State vs. Gilbert* and *State v. Houston-Sconiers,*" the court believed it had complete discretion, or an "open field to run on" in sentencing Nga. RP 10. However, the sentencing court did not have the benefit of *Delbosque*, which provides clarity about the required rigor of applying the *Miller* factors at sentencing.

In Nga's case, the sentencing court's lack of direction is evident in the court's findings, which fail to meaningfully apply *Miller* or adequately account for mitigating evidence, arriving at a sentence based on the court's own "judgment," rather than reasoned application of the *Miller* factors.

i. The court failed to meaningfully consider the *Miller* factors.

The sentencing court recognized at the outset that it was instructed to apply the *Miller* factors by statute and case law:

> Case law now specifies that for juvenile offenders the so-called 'attributes of youth,' as that term is used in the cases, are to be considered along with the non-exclusive mitigating factors recited in 9.94A.535(1). Case law now directs that the Sentencing Court consider a juvenile or a youthful offender's general degree of maturity, the lack of maturity, both developmental and physiological, that leads to traits of

> impulsivity, recklessness, susceptibility to peer pressures, inability to perceive longer range consequences of current actions, risk taking and like attributes.

RP 87. The sentencing court was unclear, however, about what information to consider and how to weigh it. RP 87. The court noted that, in this case and in other *Miller* resentencings, courts rely on "evidence of post incarceration behaviors, whether it be institutional infraction histories, educational attainments or lack thereof, various medical or rehabilitative treatments or lack of them, and similar data." RP 88. Rather than apply the *Miller* factors, the court developed its own test:

> It is implicit, I think, in this developing body of jurisprudence that the Court consider behaviors of the particular offender, both positive and negative, that give insight to the Sentencing Court about the past and present cognitive and psychological features which have manifested and will likely continue to manifest themselves in any particular offender's behavior.

RP 88.

The court's oral and written findings then detailed the evidence of Nga's borderline intellectual functioning that existed at the time of the crime to the present. CP 495-96 FF 10-15, 17-18. Indeed, nearly all of the court's written findings relate to

Nga's limited cognition. The court found that Dr. Stanfill's report and testimony established that Nga was "immature, less cognitively complex, overly compliant to antisocial peers, and directly impacted by numerous socioeconomic, geographic and other social factors beyond his control." CP 495 FF 11.

Though the court did not cite *Miller*, these findings establish Nga possessed the "immaturity, impetuosity, and failure to appreciate risks and consequences" that diminish a child's culpability. 567 U.S. at 477. However, the court did not state that it considered Nga's limited cognition under these factors or any of the other *Miller* factors it was required to consider. *Gilbert*, 193 Wn.2d at 176 (citing *Miller,* 567 U.S. at 477).

The court also discussed the "malignant" nature of the offenses. RP 95. However, the court acknowledged to "look solely at the crime being punished is only part of the issue. The other part as directed by the case law is to look at the cognitive and psychological forces that drive that behavior." RP 95. The court's findings reflect the "psychological forces" of Nga's limited cognitive ability, but failed to find, under *Miller,* how this

factored into the court's assessment of Nga's culpability at the time of the offense. CP 495-97.

The court failed to consider, as Nga asked it to and as required by *Miller,* the extent of Nga's participation in the crime, where Nga was not the shooter, was not a leader, and merely drove the car from which another child shot. RP 75; *see Miller*, 567 U.S. at 477 (sentence should consider difference in culpability between "shooter and the accomplice").

The court's failure to meaningfully consider Nga's limited role in the crime is also reflected in the court's unsupported, inapt comparison to the brutal murder in *Bassett:* "It's remarkably similar to this case, triple murder, family members slaughtered and -- that was Bassett." RP 62.

This factor is especially critical where at the time of the offense, even though Nga was chronologically older than his co-defendants, Nga functioned as if he was younger than them, and they in fact believed he was younger. CP 119; CP 495 FF 11.

Nga's youth and intellectual disabilities certainly would have impacted any legal defense, but the court did not consider this. *Miller*, 567 U.S. at 477-78. He immediately confessed to

police. CP 58; RP 78. At the time of the offense, his linguistic and education ability was so low that he was tested to have a 55 IQ. CP 495 FF 13. Yet he was forced to make legal decisions about plea bargaining and strategy the same as an adult.

Instead, the sentencing court compared Nga's life after conviction with other defendants. The court compared Nga's lack of achievement in prison with the defendant in *Bassett,* who had received his GED and was an honor roll student in community college. RP 91. The court made an even more direct comparison between Nga and his co-defendant Oloth, who, unlike Nga, was parole eligible, and "who after 22 or 23 years, was released after review by the ISRB." RP 95. The court found this was because Oloth "separated himself from gangs almost immediately after going into the prison system. He completed his education. He was generally free of serious infractions. Yet he came from the same neighborhood, the same gang culture, the same environment that Mr. Ngoeung came from." RP 95-96.

First, this finding is not supported by substantial evidence where the indeterminate review board decision in Oloth's case stated he incurred "29 serious infractions," the last

from 2012, four years before the ISRB's decision to release him. CP 115. Though there is evidence Oloth was a refugee from Laos, the court did not have evidence that Oloth suffered the same deprivation in refugee camps, extreme poverty, violence in his household, lack of education, or other factors in Nga's life that resulted in his low cognitive functioning at the time of the offense and after. CP 495-96 FF 10-15. In the end, proper application of *Miller* cannot turn on comparisons to others, but must focus on whether the individual in front of the court is among the few individuals deserving of the harshest punishment.

ii. The court did not account for the extensive mitigation evidence about Nga's infraction history.

Though the court's written findings focus almost exclusively on presumably mitigating evidence under *Miller* (without ever mentioning *Miller*), the court's oral ruling discusses what it perceived to be Nga's failure to rehabilitate himself in prison: "At the 2015 resentencing, the Court observed that Mr. Ngoeung had made no effort perceptively to engage in rehabilitative type of conduct, that being no further educational

attainment, no skills acquisition. He eschewed mental health treatment, empathy training and the like." RP 94. The court also stated it read Nga's history of infractions and "considered them," noting there was one as late as 2018 (involving a prison riot). RP 8-9, 48. The court found it was Nga's "choice" not to engage in treatment at the DOC. CP 496 FF 16.

If the court's findings in respect to rehabilitation and life circumstances as a "choice" were relevant to the *Miller* factors of the "nature of the juvenile's surrounding environment," and "factors suggesting that the child might be successfully rehabilitated," the court did not find this or state how it factored into the court's analysis under *Miller*, if at all. *Gilbert*, 193 Wn.2d at 176 (citing *Miller*, 567 U.S. at 477).

The sentencing court's focus on Nga's prison infraction history failed to give proper weight to the fact that two sentencing courts—including this one— wrongly deprived Nga of any "chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope" by sentencing him to life in prison as a child. *Graham,* 560 U.S. at 79. A child who knows he

"has no chance to leave prison before life's end has little incentive to become a responsible individual." 560 U.S. at 79.

Contrary to *Graham's* recognition that a life without parole sentence "forswears altogether the rehabilitative ideal," 560 U.S. at 74, the sentencing court here found: "[r]ehabilitation must be internally driven and those efforts undertaken for their own sake to make the individual being rehabilitated a better functioning person, to make behavioral adjustments because it's the right thing to do, irrespective of the duration of a person's incarceration." RP 94.

The sentencing court's simplistic finding that rehabilitation in prison is unaffected by a child's circumstances directly contradicts *Graham*'s observations and fails to reconcile or account for Dr. Stanfill's report and testimony that tied Nga's infraction history to his need for defense, survival, and lack of decision-making ability beyond the code of violence dictating his reality in prison. CP 253-56; *See Delbosqe,* 195 Wn.2d at 120.

*Graham* also recognized that prisons may be "complicit in the lack of development." *Graham,* 560 U.S. at 79. Prisoners serving life without parole sentences are denied rehabilitative

programming, as was also true for Nga, whose life without parole sentence and ICE detainer made programming less available to him. RP 75; CP 120. Moreover, Nga's lower cognitive functioning, lack of education, and low English skills when he first entered prison would have limited his access to programs. In prison, Nga learned to read and recently started taking GED classes. RP 73.

The sentencing court's generalized thoughts about rehabilitation thus failed to reconcile the mitigating evidence of Nga's infraction history, ignoring the specific vulnerabilities of his age, race, lack of education and lower cognitive functioning that made him less able to transcend the extreme violence that surrounded him growing up and in prison. CP 253-56.

iii. The court failed to explain why Nga's s youth and personal characteristics required a 25-year minimum sentence for his murder convictions, but not the assaults.

Like in *Delbosque,* the court failed to meaningfully consider all of the *Miller* factors and the mitigation evidence of Nga's diminished culpability in relation to them. *Delbosque,* 195 Wn.2d at 118-19. Rather than consider the evidence in light of the *Miller* factors and explain its reasoning as applied to the

facts of Nga's case, the court stated, "this, of course, is not a science. You cannot plug factors into a digital computer program and have a sentence spit out that accurately reflects all of the various competing factors that have to be considered by the Court in imposing a sentence." RP 96. The court concluded, "[i]it is a matter of judgment," and sentenced Nga to two concurrent 25 year to life terms of imprisonment. RP 96; CP 497. However, the court's recognition that Nga's actions and limited culpability merited the most lenient sentence available was inexplicably limited to the aggravated murder convictions. RP 96; CP 485-86.

*Gilbert* made clear that in resentencing a person under RCW 10.95.030 and RCW 10.95.035 the court must consider the total sentence and not merely the sentence for the aggravated murder charges. *Gilbert,* 193 Wn.2d at 176-77. If Nga was less culpable than an adult for the aggravated murders, the same must be true for the assault convictions, because Nga's act of driving the car from which another child shot—and his culpability at the time—was the same. *See e.g.* CP 57-58.

In imposing a standard range, consecutive term for the assault convictions despite finding compelling reasons to impose

an exceptional sentence, the court failed to "thoroughly explain its reasoning" sufficient for appellate review. *Gilbert*, 193 Wn.2d at 176.

Nga's sentence must be reversed for the court to meaningfully apply all of the *Miller* factors and explain its reasoning for imposing an adult sentence despite finding Nga was less culpable based on his youth and cognitive deficits. *Delbosque*, 195 Wn.2d at 120; *Gilbert*, 193 Wn.2d at 176-77.

*b. A sentencing court must be required to account for a child's intellectual disability when assessing his capacity for rehabilitation.*

Because the sentencing court did not meaningfully consider all of the *Miller* factors or explain its reasoning for imposing consecutive sentences under the SRA despite finding leniency was warranted, it is impossible to know why the court sentenced Nga to a term of 41 years, rather than the minimum of 25 years after finding his youth and personal characteristics warranted such a sentence. The sentencing court also failed to consider the fact of Nga's intellectual disability in light of all of the *Miller* factors, which provides an independent basis for reversal under our state and federal constitutions.

The court's oral ruling reflected the court perceived Nga's DOC history showed a lack of rehabilitation in relation to other juveniles. RP 8, 95-96; *see also* CP 496 FF 16. Insofar as these statements can be construed as findings in respect to capacity for rehabilitation, they are not supported by substantial evidence and establish the court failed to meaningfully consider the mitigating evidence of Nga's cognitive limitations. *See Delbosque*, 195 Wn.2d at 120.

*Roper's* and *Miller's* focus on a child's reduced culpability due to neurological underdevelopment in relation to adults is premised on the Court's recognition in *Atkins* that adults with intellectual and cognitive disabilities are less culpable, and thus less deserving of the harshest punishment. *Roper v. Simmons,* 543 U.S. 551, 570-71, 125 S. Ct. 1183, 161 L. Ed.2d 1 (2005) (citing *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)).

*Atkins* determined that in the context of adult sentencing, persons with "disabilities in areas of reasoning, judgment, and control of their impulses…do not act with the same level of

moral culpability that characterizes the most serious adult criminal conduct." *Atkins,* 536 U.S. at 306.

Mental retardation as considered by *Atkins* applied to people with IQs in the 70 range. *Id.* at 318. IQ scores between 70 and 85 indicate a "'borderline intellectual functioning category,' which empirical research has shown significantly impacts an individual's ability to control impulses, develop analytical capabilities, problem-solve, and exercise higher-level reasoning skills." Adam Lamparello, *IQ, Culpability, and the Criminal Law's "Gray Area": Why the Rationale for Reducing the Culpability of Juveniles and Intellectually-Disabled Adults Should Apply to Low-IQ Adults,* 65 Loy. L. Rev. 305, 323 (2019).

Indeed, "the reasons underlying the link between low IQ and crime are strikingly similar to those pertaining to juvenile delinquency and intellectual disability; "low-IQ adults struggle with impulse control and the ability to appreciate the consequences of their actions." *Id.* at 314. Low-IQ adults, like juveniles and intellectually-disabled adults, suffer from impairments that affect their ability to conform to the requirements of law or form a culpable mental state. *Id.* at 315.

Researchers have made the following observations of persons with intellectual disability as they progress through the criminal justice system: "In court, they confessed more readily, provided incriminating evidence, were less likely to plea-bargain, were more likely to have been convicted, and received longer sentences." Astrid Birgden, *Enabling the Disabled: A Proposed Framework to Reduce Discrimination Against Forensic Disability Clients Requiring Access to Programs in Prison,* 42 Mitchell Hamline L. Rev. 637, 646 (2016).

This is certainly true in Nga's case, where his co-defendant, the actual shooter, received a lesser sentence, and was released on parole after 22 years. The other co-defendant also took an advantageous plea deal. CP 493-94 FF 5. Nga confessed immediately and received the harshest sentence, despite having shot no one.

Nga pointed out the paradox of focusing on prison rehabilitation for people with reduced cognitive ability: "the reason why Nga struggled and struggles in DOC today is what makes him less culpable for the criminal activity as a juvenile." RP 74. Lower intellectual functioning inhibits rehabilitation in

prison. Birgden, *supra,* at 646. Studies show that people with intellectual limits in prison "were more likely to have been abused or victimized and engaged in poorer institutional behavior. Therefore, they became over-classified with a higher security level." *Id.* Birgden observed programs in prison are not "generally accessible to offenders with an IQ lower than eighty points." *Id.* at 676.

And though prison certainly creates distress for most people, prisoners with cognitive disabilities "have been found, on psychometric measures, to suffer three times the depression and anxiety levels as general population prisoners." *Id.* at 687.

Nga's experience in prison reflects the experiences of those with lower intellectual functioning. In prison he suffers from "anxiety" and "recurrent major depression." CP 496 FF 15. His prison infractions are not predatory, but show his need for group protection and are driven by vulnerabilities of youth, relative immaturity and "poor cognition." CP 255. Nga was unable to complete his general education requirements (GED) and he worked for only three months of his sentence. CP 61.

These aspects that make rehabilitation in prison far more difficult for a person with an intellectual disability must be thoroughly accounted for in light of *Miller*'s consideration of "any factors suggesting that the child might be successfully rehabilitated." *Gilbert,* 193 Wn.2d at 176 (citing *Miller,* 567 U.S. at 477). A trial court's failure to account for intellectual disability would untether *Miller* from its moorings, since *Miller's* requirement that the sentencing judge consider the child's personal characteristics derives from the Court's same requirement regarding reduced culpability for those with intellectual disabilities. *See Graham,* 560 U.S. at 61(citing *Roper*, 543 U.S. 551) (prohibiting the harshest punishment for defendants who committed their crimes before the age of 18); *Atkins*, 536 U.S. 304 (prohibiting death sentence for those "whose intellectual functioning is in a low range").

*Atkins* recognized the specific challenge intellectual disability poses to rehabilitation "can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found." *Atkins*, 536 U.S. at 321.

This tension was apparent in Nga's case, where the judge asked Dr. Stanfill whether Nga's low cognitive functioning made him less capable of rehabilitation:

> THE COURT: I asked you about Dr. Mayers' report from 1990 where Mr. Ngoeung was granted social security benefits. She administrated the Wechsler Intelligence for Children Revised. He comes with a full scale IQ of 55. I mean how is he going to take from that, which is presumably not that malleable, and make the kind of adjustments even with wraparound services as you described that give the Court any kind of confidence he is not going to end up back in prison?

RP 41. Dr. Stanfill responded that this result was likely artificially low because of Nga's lack of English ability, and as an adult he tests in the low '80s, which is "borderline" intellectual functioning. RP 41; CP 495 FF 14. This means he would not need institutional support beyond what his family was able to provide. RP 42.

However, the court still went on to improperly compare Nga's struggles in prison with his co-defendant Oloth, who by all measures, appears to have notable intellectual aptitude. Oloth immediately completed his GED, numerous treatment programs and multiple education programs towards an AA degree. CP

115. Once released from prison, he continued his study at the University of Washington, where he has been on the dean's list every quarter. CP 121. Few inmates could meet such a high bar, much less those with cognitive deficits.

The court did not state whether its generalized finding that "rehabilitation must be internally driven," RP 92, and the court's comparison of Nga's progress in prison to Oloth's factored into its analysis under *Miller.* If it did, these findings are not supported by substantial evidence because they fail to account for Nga's intellectual disability, which the court described as an "ongoing brain issue that is not behaviorally driven." CP 496 FF 18.

When as here, there is evidence a defendant's cognitive disability diminishes his opportunity for rehabilitation in prison, this must be factored into the court's assessment under *Miller*'s required consideration of any factors "suggesting the juvenile might be rehabilitated." *Gilbert,* 193 Wn.2d at 176. The sentencing court's failure to address this mitigating aspect under *Miller* in relation to Nga's perceived lack of rehabilitation in prison requires reversal and remand for resentencing to

ensure that Nga is not punished for lacking the same potential for rehabilitation as a juvenile without his cognitive limitations. *See Atkins,* 536 U.S. at 306.

*c. The sentencing court wrongly placed the burden on Nga to prove his youth warranted an exceptional sentence.*

By applying the SRA's exceptional sentencing provision, the court put the burden on Nga to prove he was entitled to an exceptional sentence. This was error. The state constitution requires the presumption of a mitigated sentence, which the State failed to overcome by any standard of proof.

i. The court mistakenly applied the SRA's exceptional sentence provision.

RCW 9.94.535(1) governs the sentencing of adults under the SRA, and requires the defendant to prove mitigating circumstances justifying an exceptional sentence by a preponderance of the evidence. This SRA provision does not control the sentencing of a child under RCW 10.95.030: "This reasoning does not extend to sentencing hearings pursuant to the *Miller-fix* statute, which unlike the SRA, does not impose a burden of proof on either party." *Delbosque*, 195 Wn.2d at 123.

The sentencing court here improperly relied on this SRA provision, placing the burden on Nga to prove the court should not impose consecutive life sentences.

The sentencing court stated that Nga's personal attributes and youth justified imposing an "exceptional sentence" of concurrent terms for the aggravated murder convictions based on *Gilbert* and RCW 9.94A.535(1). CP 497. The court then ordered a standard range, consecutive sentence for the assault convictions as urged by the prosecutor under RCW 9.94A.589(1)(b). CP 486.

However, nothing in RCW 10.95.030 says the court must impose consecutive terms for more than one offense unless it imposes an exceptional sentence. Nor could the statute be read to require this, because this would mandate de facto life sentences for any child charged with more than one count of aggravated murder, which is prohibited under the Eighth Amendment and Article I, section 14. *Ramos*, 187 Wn.2d at 438; RCW 10.95.030(3)(b); *State v. Ronquillo*, 190 Wn. App. 765, 768, 361 P.3d 779 (2015) (51.3 years is a de facto life sentence).

Thus the court's application of the SRA's "exceptional sentence" framework to RCW 10.95.030 reveals the court believed that in order to sentence Nga to concurrent terms, he had to prove an exceptional sentence was warranted where he had no such burden. *Delbosque*, 195 Wn.2d at 123.

The court's "exceptional sentence" of concurrent terms under RCW 10.95.030 was premised on the SRA's inapplicable framework, misallocating the burden of proof to Nga. *Id.*

ii. The court was required to presume Nga's youth required an exceptional sentence.

Nga's sentence imposed pursuant to RCW 9.94A.535(1) was error and requires reversal. This Court should also reverse on the separate basis that our State Constitution requires the sentencing court to presume Nga's youth requires an exceptional, mitigated sentence.

The United States Constitution forbids cruel and unusual punishment. U.S. Const. amend. VIII, XIV. The Washington Constitution prohibits "cruel" punishment. Const. art. I, § 14. When state and federal constitutional claims are raised, this Court has a "duty to resolve constitutional questions under our

own constitution." *State v. Gregory,* 192 Wn.2d 1, 16-17, 427 P.3d 621 (2018). "[I]n the context of juvenile sentencing, article I, section 14 provides greater protection than the Eighth Amendment." *Bassett,* 192 Wn.2d at 82.

Unless the State proves otherwise, age is necessarily mitigating for children because they are categorically different and less culpable than adults. *Miller,* 567 U.S. at 471; *Bassett*, 192 Wn.2d at 87. Therefore, for children sentenced in adult court, mitigation based on the fact the defendant was a child is a constitutional presumption, not the exception.

*Ramos* found under the Eighth Amendment that "*Miller* does not require that the State assume the burden of proving that a standard range sentence should be imposed, rather than placing the burden on the juvenile offender to prove an exceptional sentence is justified." *State v. Gregg*, 9 Wn. App.2d 569, 576, 444 P.3d 1219 (2019), *review granted,* 194 Wn.2d 1002, 451 P.3d 341 (2019) (citing *Ramos,* 187 Wn.2d at 436-37). However, *Ramos* was decided under the Eighth Amendment. Subsequently *Bassett* held that article I, section 14 is more protective in the context of juvenile sentencing than the

Eighth Amendment. 192 Wn.2d at 82. *Delbosque* does not address this constitutional question. It found only that RCW 10.95.030 does not allocate a burden of proof and "decline[d] to write one in." *Delbosque,* 195 Wn.2d at 124. Our state Supreme Court has accepted review of this question in *Gregg,* 194 Wn.2d 1002.

While children's cases may be transferred to adult court, standard range sentences were intended for adults, not children. *State v. O'Dell*, 183 Wn.2d 680, 691, 358 P.3d 359 (2015); RCW 13.04.030(1)(e). Based solely on Nga's age at the time of the crime, the law presumes he is less culpable for his actions and more likely to be successfully rehabilitated. *See Bassett,* 192 Wn.2d at 89 (it is "the rare juvenile offender whose crime reflects irreparable corruption" (quoting *Roper,* 543 U.S. at 573)). The State should therefore have the burden to overcome the presumption that a child, despite the mitigating features of his youth, may be subject to an adult standard range sentence.

Placing the burden on the child to prove he deserves a mitigated sentence creates an unacceptable risk that children undeserving of adult sentences will receive them. *See Bassett*,

192 Wn.2d at 89 (Sentencing courts may make "imprecise and subjective judgments" in applying the *Miller* factors). Applying article I, section 14, a mitigated sentence is appropriate for a juvenile offender sentenced in adult court unless the prosecution proves otherwise beyond a reasonable doubt.

iii. The prosecutor failed to show by any standard of proof that Nga's sentence should exceed the presumptive minimum.

The court began the sentencing hearing stating it had reviewed the State's and Nga's sentencing memos and supporting documents. RP 6-7. Rather than require the prosecutor to present his case, the court noted "there is no rigid way to conduct these kinds of hearings." RP 12.

When the court called the prosecutor to begin its case, the prosecutor stated it was only submitting the evidence attached to its sentencing memo, which included Nga's DOC infraction history and court documents for the underlying offense. RP 7-8; CP 323-479. The prosecutor put on no witnesses, noting only that the victims' families wished to speak. RP 9. The prosecutor stated he did not "think that their input is necessarily germane to the issue of the exceptional sentence. But it is

something that the Court should consider in connection with imposing the sentence." RP 8. In other words, the prosecutor believed since Nga was requesting an exceptional sentence, Nga had the burden to produce evidence in support his request. RP 8.

Rather than address Nga's mitigation or the *Miller* factors, the prosecutor urged the judge to consider the first sentencing judge's unconstitutional sentence. The prosecutor claimed the first sentencing judge was "well aware of" Nga's age and stated even if she had not been bound by the mandatory sentence at the time, she would have given Nga the same sentence: "that was her reaction to this Defendant and what he did back in 1995 when she conducted this trial." RP 58-59. Using this illegal sentence as a benchmark, the prosecutor urged the court to take into account the victim's suffering, not to "dwell" on the mitigating circumstances under *Miller*. RP 66.

The prosecutor insisted on the significance that Nga was "the oldest person in the car, just months shy of his 18th birthday," despite the overwhelming evidence that Nga was less cognitively sophisticated than a typical 17-year-old and the other juveniles in the car. RP 65; CP 119.

The prosecutor ignored the evidence of Nga's limited cognitive functioning, comparing Nga to his brother, who "came from exactly the same circumstances under exactly the same time period living in exactly the same household with the same parents." RP 67.

The prosecutor focused on Nga's infraction history from the perspective of the ISRB and the likelihood of recidivism, rather than in respect to the *Miller* factors. RP 46-47.

The prosecutor relied on the SRA's sentencing provisions under RCW 9.94A.189(1)(b) to argue to the court that consecutive terms were the minimum term: "I'm asking for the minimum in this case. I'm just suggesting that the appropriate sentence here should punish each of these crimes separately with a consecutive sentence." RP 68. The prosecutor argued "the legislature in this state has mandated a couple of things," including consecutive sentences for serious violent offenses such as the assault in the first degree charges. RP 60. The prosecutor acknowledged "the Court has discretion to go the other way, I submit to you that the right thing to do or the just thing to do is for each of these crimes to carry its own penalty." RP 62, 66.

These arguments fail to establish that Nga is in the rare category of incorrigible youth deserving of an adult standard range sentence by any standard of proof. *See Bassett,* 192 Wn.2d at 89 (it is only "the rare juvenile offender whose crime reflects irreparable corruption"). Failing to overcome its burden to show Nga's presumptive reduced culpability required a sentence in excess of the minimum term, the court erred in granting the prosecutor's request for consecutive sentences for the assault convictions. CP 486.

*d. The sentencing court's unconstitutional application of* Miller *and misallocation of the burden of proof requires reversal and remand for resentencing.*

The court's failure to mention, much less meaningfully consider all of the *Miller* factors, including failing to reconcile the mitigating evidence and failing to explain the basis for its adult-length sentence despite finding Nga's aggravated murder convictions required the most lenient sentence, was an abuse of discretion that failed to conform with *Miller*'s constitutional demand, requiring reversal and remand for resentencing. *Delbosque,* 195 Wn.2d at 116, 120, 127.

The court's reliance on the SRA's exceptional sentence provision that required Nga prove he was entitled to an exceptional sentence misallocated the burden of proof to Nga. This is not permitted under RCW 10.95.030 and reversal is required. *Id.* at 123. Alternatively, because the sentencing court did not require the prosecutor to prove by any standard of proof that Nga was in the rare category of children who deserving of an adult sentence as is required under Article I§, section 14, his sentence should be reversed and remanded for a new sentencing hearing before a different judge.

F. CONCLUSION

Nga is entitled to a sentencing hearing where a court fully and meaningfully considers his diminished culpability and prospects for change. Because of the sentencing court's demonstrated inability to do so on two prior occasions, this Court should direct that to occur in front of a different judge.

DATED this 23rd day of April 2020.

Respectfully submitted,

s/ Kate L. Benward
Washington State Bar Number 43651
Washington Appellate Project
1511 Third Ave, Suite 610

Seattle, WA 98101
Telephone: (206) 587-2711
Fax: (206) 587-2710
E-mail: katebenward@washapp.org

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**
**DIVISION TWO**

| | | |
|---|---|---|
| STATE OF WASHINGTON, | ) | |
| | ) | |
| Respondent, | ) | |
| | ) | NO. 54110-6-II |
| v. | ) | |
| | ) | |
| NGA NGOEUNG, | ) | |
| | ) | |
| Appellant. | ) | |

## DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF APRIL, 2020, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

| | | | |
|---|---|---|---|
| [X] | KRISTIE BARHAM, DPA<br>[PCpatcecf@co.pierce.wa.us]<br>[kristie.barham@piercecountywa.gov]<br>PIERCE COUNTY PROSECUTOR'S OFFICE<br>930 TACOMA AVENUE S, ROOM 946<br>TACOMA, WA 98402-2171 | ( )<br>( )<br>(X) | U.S. MAIL<br>HAND DELIVERY<br>E-SERVICE VIA PORTAL |
| [X] | NGA NGOEUNG<br>738114<br>WASHINGTON STATE PENITENTIARY<br>1313 N 13TH AVE<br>WALLA WALLA, WA 99362-1065 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 23RD DAY OF APRIL, 2020.

X_____

**Washington Appellate Project**
1511 Third Avenue, Suite 610
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

## WASHINGTON APPELLATE PROJECT

## April 23, 2020 - 4:03 PM

## Transmittal Information

| | |
|---|---|
| **Filed with Court:** | Court of Appeals Division II |
| **Appellate Court Case Number:** | 54110-6 |
| **Appellate Court Case Title:** | State of Washington, Respondent v. Nga Ngoeung, Appellant |
| **Superior Court Case Number:** | 94-1-03719-8 |

**The following documents have been uploaded:**

- 541106_Briefs_20200423160226D2470043_4913.pdf
  This File Contains:
  Briefs - Appellants
  *The Original File Name was washapp.042320-12.pdf*
- 541106_Designation_of_Clerks_Papers_20200423160226D2470043_2049.pdf
  This File Contains:
  Designation of Clerks Papers - Modifier: Supplemental
  *The Original File Name was washapp.042320-10.pdf*
- 541106_Motion_20200423160226D2470043_1140.pdf
  This File Contains:
  Motion 1 - Waive - Page Limitation
  *The Original File Name was washapp.042320-11.pdf*

**A copy of the uploaded files will be sent to:**

- PCpatcecf@piercecountywa.gov
- kristie.barham@piercecountywa.gov

**Comments:**

---

Sender Name: MARIA RILEY - Email: maria@washapp.org
**Filing on Behalf of:** Kate Benward - Email: katebenward@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

**Note: The Filing Id is 20200423160226D2470043**